Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

PARENTS AGAINST TESTING BEFORE TEACHING, ET AL,

PETITIONERS

vs.

ORLEANS PARISH SCHOOL BOARD, LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ET AL,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE 5TH CIRCUIT

APPENDIX

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Appendix Table of Contents

	page
Fifth Circuit Judgment	A-1
District Court Motion Hearing	A-3
District Court Judgment	A-5
Fifth Circuit Oral Argument	A-8

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-31267

PARENTS AGAINST TESTING WITHOUT TEACHING, an unincorporated association; CHARMAINE BRYANT, individually and on behalf of her minor child, Krystal Bryant; BRYANT SMOOT, STEPHEN SMOOT, individually and on behalf of their minor child, Lynette Smoot, WAYNE THOMPSON, ROMONA THOMPSON, individually and on behalf of their minor children Savannah Thompson and Stephen Thompson, NATHANIEL BROWN, DIANNE BROWN individually and on behalf of their minor child, Irene Brown, ALTHEA FRANKLIN, individually and on behalf of her minor child Dominique Franklin, DIEDRA RAYFIELD, individually and on behalf of her minor child, Jessie Rayfield, EVELYN MAGEE, MELVIN MAGEE, individually and on behalf of their minor child Maurice Magee, TAMAR ALLEN, individually and on behalf of her minor child, Daniel Allen, NAOMI MARK, individually and on behalf of her minor child, Tiffany Raines,

Plaintiffs-Appellants,

versus

ORLEANS PARISH SCHOOL BOARD, GAIL MOORE GLAPION, in her official capacity as Board President, THE LOUISIANA STATE BOARD OF ELEMENTARY & SECONDARY, GLENNY LEE BUQUET, in her capacity as president of the State Board of Elementary and Secondary Education, CECIL PICARD, in his capacity as Louisiana's State Superintendent of Education,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
Civil Docket #00-CV-2525

Before DAVIS, and JONES, Circuit Judges and BARBOUR, District Judge.*

PER CURIAM:**

This court has carefully considered the issues on appeal in light of the parties' briefs, oral argument, and pertinent portions of the records. Having done so, we, first find no deficiency in the appellants' notice of appeal and therefore have appellate jurisdiction.

Next, we affirm for essentially the reasons stated by the district court. The court did not err in finding no due process violations under federal or applicable state law. In particular, the Deborah P. case cited by appellants pertains to the narrow right of graduating seniors to obtain a diploma, and not to any expectation of promotion in the public schools from year to year. Deborah P. v. Turlington, 644 F.2d 397 (5th Cir. - - Unit B 1981). Further, appellants' briefing did not sustain their assertion of private causes of action under federal statutes, including those covering age discrimination. The district court did not abuse its discretion in denying a preliminary injunction against the administration of the LEAP21 test and enforcement of its results.

The judgement of the district court is **AFFIRMED.**

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*District Judge of the Southern District of Mississippi, sitting by designation.

** Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir . R. 47.5.4.

September 17, 2001

A-3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PARENTS AGAINST TESTING	CIVIL ACTION
VERSUS	NO. 00-2525
ORLEANS PARISH SCHOOL BOARD, ET AL	SECTION "N"

JUDGE EDITH BROWN CLEMENT PRESIDING
THURSDAY, SEPTEMBER 14, 2000 AT 10:30 AM

Courtroom Deputy: Pam Radosta
Court Recorder: Dee Malouse
Appearances: Willie Zanders and Errol Ware for plaintiffs
Franklin Endom, James Stapp, Michael Hicks, Richard Curry, Michael Rubin, for defendants

MOTION OF STATE DEFENDANTS TO DISMISS AND MOTION OF ORLEANS PARISH SCHOOL BOARD DEFTS. TO DISMISS:

Argument

PLTF'S MOTION FOR PRELIMINARY INJUNCTION:
Witnesses sequestered.
Pltf's witnesses: Dr. Rosalind Hale- testimony by stipulation
Ramona Jean-Mitchell- sworn & testifies
Gail Glapion-testimony by stipulation
Ramona Jean-Mitchell- recalled, resumes testimony

Page 2- Smooth Minutes
00-2525 - September 14, 2000

Pltf's witnesses cont'd: Superintendent Picard - testimony by stipulation.
State Defendants re-urges Motion to Dismiss - argument.
IT IS ORDERED that Motion of all defendants to Dismiss - **GRANTED,** with the exception of the Title VI Claims. Plaintiff given 60 days to conduct discovery.
IT IS FURTHER ORDERED that Plaintiff's Motion for a Preliminary Injunction is **DENIED.**
Written reasons to be entered.
Plaintiff to amend the complaint in one week.
Court adjourns.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

PARENTS AGAINST TESTING BEFORE TEACHING, ET AL.	* CIVIL ACTION
VERSUS	* NO. 00-2525
ORLEANS PARISH SCHOOL BOARD, ET AL.	* SECTION "N"

JUDGMENT

In accordance with the Minute Entry entered contemporaneously herewith, **IT IS ORDERED, ADJUDGED, AND DECREED,** pursuant to FED.R.CIV.PROC. 58, that judgment be entered in favor of all Defendants and against all Plaintiffs, each party to bear its own costs.

New Orleans, Louisiana, this 10TH day of October, 2000.

/s/ Edith Brown Clement
EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
CLEMENT, J.
October 10, 2000

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

PARENTS AGAINST TESTING BEFORE TEACHING, ET AL.	* CIVIL ACTION
VERSUS	* NO. 00-2525
ORLEANS PARISH SCHOOL BOARD, ET AL.	* SECTION "N"

REASONS FOR RULING

On September 14, 2000, the Court heard oral argument on Plaintiffs' Motion for Preliminary Injunction and Defendants' Motions to Dismiss. The Court granted Defendants' Motions and dismissed all claims except for Plaintiff's title VI claims. Plaintiffs were given 60 days to conduct discovery with repect to those claims.

Although the Fifth Circuit found that the students in Debra P. v. Turlington, 644 F.2d 397 (1981), had a property interest in a diploma, no court has ever recognized a property interest in promotion, *see, e.g.,* Erik V. v. Causby, 977 F. Supp. 384, 388 (E.D.N.C. 1997)(denying plaintiffs' preliminary injunction motion because, *inter alia,* a "right to promotion from one school grade to another" has never been recognized) , and several courts have rejected the notion. See Killion v. Burl, 860 F.2d 306 (8th Cir. 1988) (per curiam) (affirming summary judgement in favor of defendants

on student's due process claim because no liberty or property interest in promotion to the second grade"); Hartfield v. East Grand Rapids Pub. Schs., 960 F. Supp. 1259, 1266-67 (W.D. Mich 1997)(granting defendants motion to dismiss because, *inter alia*, the children had no "liberty or property interest in promotion to the ninth grade")(citing Killion). Perhaps in light of this authority, Plaintiffs did not assert an interest in promotion, but instead asked the Court to enforce their constitutional rights to "due process [and] fundamental fairness" in education. See Plaintiff's Mem. in Support of Prelim. Inj. p.1 and Oral Argument. It is well settled, however, that there is no free-standing right to "fairness" or "process;" rather, to bring a due process claim, a plaintiff must show that he or she has been deprived of life, liberty, or property without the due process of law. See, e.g., Killion, 860 F.2d at 306 (citing Board of Regents v. Roth, 408 U.S.564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972)). Because plaintiffs failed to established that they have been deprived of a liberty or property interest, the Court granted Defendants' Motion to Dismiss with respect to the Plaintiff's constitutional claims.

The Court also found an insubstantial basis for Plaintiffs' other claims. For example, Plaintiffs failed to provide any authority to demonstrate that a private cause of action exists under 20 U.S.C.

The Court provided Plaintiffs with an opportunity to conduct discovery with respect to their Title VI claims. However, on October 5, 2000, Plaintiffs moved to dismiss these claims without predjudice. The Court granted the unopposed motion on October 10.

Because all of Plaintiffs' claims have been dismissed, the court shall order judgment in favor of Defendants.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PARENTS AGAINST TESTING
CASE NO.: 00-31267

BEFORE TEACHING,

PLAINTIFF-APPELLANTS

VERSUS

ORLEANS PARISH SCHOOL BOARD,

LOUISIANA STATE BOARD OF ELEMENTARY

AND SECONDARY EDUCATION, ET AL,

DEFENDANTS-APPELLEES

* * * * * *

The oral argument in the above-entitled cause, before Dorothy N. Gros, a certified court reporter.

Held at the United States Court of Appeals, 600 Camp Street, New Orleans, on Thursday, August 9, 2001, beginning at 11:16 a.m.

APPEARANCES:

COURT OF APPEALS: Judge Davis
(Presiding)
Judge Jones
Judge Barbour

REPRESENTING APPELLANTS:
Willie M. Zanders, Esq.

REPRESENTING APPELLEES:
Michael H. Rubin, Esq.
Franklin V. Endom, Jr.

REPORTED BY: DOROTHY N. GROS, CCR
CERTIFIED COURT REPORTER

INDEX

PAGE

Caption. 1

Appearances. 2

Certificate. 29

Oral Examination By:

MR. ZANDERS. . . . . .4, 2?

MR. RUBIN 15

MR. ENDOM 21

PROCEEDINGS

Judge Davis:

We'll call the last case of the day, PARENTS AGAINST TESTING VERSUS ORLEANS PARISH SCHOOL BOARD. We will hear first from Mr. Zanders.

MR. ZANDERS:

Good morning and thank you, Your Honor. It's an honor to present legal argument on behalf of public school parents and students who have petitioned this court for relief. We would like to cover four basic issues that were presented before the District Court to give the Court an idea of the critical issues as we see them here in Fifth Circuit.

One, in the District Court, plaintiff argued that fourth and eighth grade students have a property interest and a liberty interest in a public education. I respectfully suggest that this question was answered in a 1981 case heard by the Fifth Circuit called DEBRA P. VERSUS TURLINGTON.

The second issue presented was our argument that state education officials arbitrarily and capriciously implemented the LEAP program in violation of Louisiana Revised Statue 1724.4.

And, the third issue raised was the plaintiff's position that in addition to the student's federal constitutional rights, Louisiana's constitution afforded them due process and equal protection under the law. And, the fourth issue is that Louisiana's fast track implementation of the LEAP testing program was fundamentally unfair and it was inconsistent with the due process mandate of the 14th amendment.

On the first issue raised, that of student's having a property interest in the public education, we direct the Court's attention to the language in the 1981 case which states that the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which may be protected by the due process laws and in the District Court the main argument was that fourth graders and eighth graders did not have such a property interest in education - -

JUDGE DAVIS:

I guess the problem I have with that argument is I don't see how failure to pass this test deprives them of a public education. What it requires them to do is either to retake the test or repeat the previous grade. So, how is this depriving them of a public education?

MR. ZANDERS:

Well, Your Honor, I would respectfully suggest that the key term in the language is that they have a property interest in a public education as opposed to whether or not they are being denied a public education. Is there any value to being promoted. So, in response to Your Honor's question, in the Debra P. case the court said that graduation is the logical extension of successful attendance. Now if graduation is the logical extension of successful attendance. That's the same as saying that graduation is a logical extension of promotion or being promoted. We're saying that promotional decisions have some value. But for being promoted, one could never graduate. Being promoted is the pathway to graduation or to a diploma. To deprive students of that pathway is to deprive them of a diploma and I should say to the Honorable

Court that even the State education officials admitted in their process. I would direct the Court's attention to page 14 in the school board's brief and it says, specifically, "The school board defendants do not dispute the existence of a property right in a free public education under Louisiana law. The existence of this property right requires the observance of federal procedural due process minimum." I understand the technical implications of the fact that they are being educated so then they are not being deprived of anything of value or not being deprived of an education. These students have been retained and will be retained at grade level.

The other issue is in the Fifth Circuit case, the U.S. Supreme Court case, GOSS VERSUS LOPEZ, is cited. GOSS VERSUS LOPEZ stands for the proposition is that the due process laws also forbids the arbitrary deprivation of liberty where a persons good name, reputation, honor is at stake. These students have been labeled illiterate. They've been labeled failures and we believe that students under the 14th amendment as in the GOSS case, the 1975 Supreme Court case and there was a 1966 Supreme Court case called TINKER VERSUS DEMOINES.

Now in the Tinker case, the Supreme Court said, and I quote, "Students and teachers are not deprived or do not shed their constitutional rights at the schoolhouse gate. Now in that Tinker
case - -

JUDGE BARBOUR:

What if a child was not promoted to the fifth grade because the child had missed "x" number of days from school. I assume the New Orleans school system has some minimum days that they are required for attendance for promotion.

MR. ZANDERS:
Yes.

JUDGE BARBOUR:
What's the difference in that and not passing the test? If promotion is the property issue.

MR. ZANDERS:
Judge Barbour, here is one major distinction. We have the students who did not pass the standards as set forth by their teachers, those students are not before the court as part of the petition. Those students should not be promoted. We're talking about students who were denied promotion based on a test, the LEAP test, that was implemented in March of 1999 and in Orleans Parish the curriculum for the LEAP test was not distributed until August of 2000. So, they were not taught any materials on this state mandated test.

JUDGE BARBOUR:
That's the due process claim, I'm talking about your status claim as to whether this is a property interest.

MR. ZANDERS:
Well, in the Debra P. case and that's our best jurisprudence on the issue. In that case the students were in the tenth grade, eleventh grade and twelfth grade. It was a Florida literacy test dealing with illiteracy. And there was no distinction made by this Court as to distinction between the tenth grader or the eleventh graders because all were not graduating at that point. So all were afforded according to that case a four year delay in the

implementation of the test and that's what we're asking. We understand that under the 10th amendment, the state has the right to test students. We understand that that's part of the disciplinary power.But for jurisprudence says that in implementing its policies the state must do so in a manner that's consistent with the constitution. So, if I understand the question in terms of standing, then I believe that a careful review of the jurisprudence with GOSS VERSUS LOPEZ and with another Fifth District Case,Burnside case, which we mentioned in our brief, the Court in disciplinary matters has not made a distinction in terms of standing and the right of students with disciplinary problems to come before the Court and I would feel that unless it's a new area and a greater distinction of law that students with questions about a test that will hold them back have as much right to appear in the Court as a student who has been expelled for a disciplinary reason because the case law does not make a distinction between the nature of the right for those students who come to court.

JUDGE JONES:

Let's say your students can't pass these LEAP test and notwithstanding that they keep moving from grade to grade, what is the implication of that?

MR. ZANDERS:

Your Honor - -

JUDGE JONES:

Let's say the fourth graders can't pass, does that mean that you're basically going to teach fourth grade things in fifth grade and suppose they still can't pass, are you going to move fourth grade up to six graders.

MR. ZANDERS:

No, Your Honor, what we're suggesting is that the information is that when the State has mandated this new program, and we agree that ultimately students will improve academically. But to test fourth graders, this was not an end of the year exam. This was a cumulative four year exam. I think that distinction is important. So, the fourth graders was tested on four years of material. Now, had it been a year end exam and then - - I understand Your Honor's point. But this was a four year exam, a cumulative exam for fourth graders with no notice in Orleans Parish in terms of the materials and it was an eight year exam for eighth graders, eight year cumulative.

JUDGE JONES:

I'd be a lot more concerned about that if we were talking about college and where you're learning different things every year. But, I have two children and I must say if they had forgotten by fourth grade what they learned in first grade, I'd want them held back. I don't quite understand this cumulative argument that you're making.

MR. ZANDERS:

Your Honor, I think in terms of cumulative, it's the nature of that state test that was criteria referenced based on specific materials. Based on specific materials that the State with it's consultants came up with as opposed to materials that the students fourth grade teachers -

Your Honor, if I were to respond to that on the same level in terms of fourth grade. If the teachers of fourth graders at the local level believed and recommend that the students be promoted based on what they learned during those months, then in this instance those students would not be promoted because of the LEAP test.

In American Educational Affairs never before have teachers and local school boards been replaced in terms of making such academic decisions when even the local board and we've made that representation at the lower court. The local board passed a resolution saying that the teachers and students were not prepared. So, as part of this accountability plan the only individuals who were punished and held fully accountable were the students. The teachers have not been held accountable. The local board has not been. We're not pointing fingers, the point is we're saying that students should not be retained until there has been adequate time for the teachers to teach the materials. So, it is a process issue.

JUDGE DAVIS:

You think that this Court is equipped to tell the State at what point the teachers are ready to give the test and what point the students are ready to take the test?

MR. ZANDERS:

Your Honor, with all due respect, I think this very Court in 1981 established the most important case in high sta[k]es testing. And that case is DEBRA P. VERSUS TURLINGTON and it's cited every where and the Fifth Circuit Court of Appeals denied and said that the State of Florida must wait four years before they implemented their literacy test. We're saying with all due respect that had the District Court looked at the established law precedent in that case, then the evidence would have been fully presented, which we were not allowed to do so because of the standing issues. So, yes, Your Honor, with all due respect this Court has done it. The Debra P. case stands unchallenged in terms

of telling the State that it did not allow enough time for its new literacy program.

JUDGE BARBOUR:

Didn't Debra P. turn on a discriminatory issue as opposed to a straight education?

MR. ZANDERS:

Your Honor, that was one of five issues. But, Debra P. it was the fact that it had been under desegregation orders and there was a long number of African American students - -

JUDGE BARBOUR:

Your not alleging any racial animus in the action of the city schools?

MR. ZANDERS:

Yes in our District Court, not on Appeal. In the District Court level we pointed out that in urban communities there was an astonishing large number of African Americans, 15,000 out of 20,000, but that was mentioned at the District Court level. The issue of disparated impact is not mentioned here. We are only dealing with the due process issue, fundamental fairness issue. This is the exact language that comes from the Fifth Circuit opinion. So, no, we are not saying on appeal that it was race because we were told that we would have to prove that it was intentional,which would have been difficult under the circumstances.

The other case that's important to be cited is a case called Crump and the citation 797 federal supplement 552, CRUMP VERSUS GILMORE. Now, that was a Texas

case, Judge Jones, a 1992 case. And in that case the Texas District Court said that eighteen months was inadequate time for a new testing program. So, yes,Courts have and we believe they should, given the constitutional issues at stake, look to State and Government and say, "You're doing the right thing but perhaps too soon." And that's what the Court said in the Florida case. That the implementation was the problem. And that it was fundamentally unfair to test students on materials that they have never been taught. Courts have done it and the record is very clear on those issues.

We would also like to mention as I have the yellow light is that State educational officials had a duty to review the material that are related to
LEAP but in the District Court testimony, the superintendent said no one at his office had reviewed any of the curriculum materials. In the record there was testimony given, so the State hurriedly put the LEAP program together, started with testing as opposed to accountability and the students were held accountable first and last and no one else has been held accountable. We're saying not to get rid of the test but to put it on hold to give all parties an opportunity to learn the new materials and that's the question of fairness and perhaps it is also a question of justice in that the students are being treated different from anyone else.

JUDGE DAVIS:

You have some time left for rebuttal, Mr. Zanders.

MR. ZANDERS:

Yes.

JUDGE DAVIS:

Mr. Rubin.

MR. RUBIN:

As Judge Jones pointed out in the GRIFFITH VERSUS JOHNSON case in 1990 and NEWORTH VERSUS LOUISIANA STATE BOARD OF DENTISTRY in 1988 in the absence of a liberty or property interest there can be no due process violation. Seven things are abundantly clear in this case.

First, the plaintiffs concede below and in their brief, page eleven and the record at page 105 that there is no constitutional right to a promotion. They concede that point. Secondly, they don't seek to halt the LEAP test. Third, this is not a class action and any request for injunctive relief is moot. Fourth, every child who is a plaintiff here continues to receive an education, continues to receive remediation and summer school even if they have not scored approaching basic. Not even basic, but approaching basic on the LEAP test.

Fifth there are no title claims here. Sixth, those have been dismissed. Seventh, every single statute relied upon by the plaintiff as providing a cause of action even assuming they have been properly briefed, which they haven't do not create a private cause of action. And last, the notice of appeal demonstrates that this court is without jurisdiction.

Let me jump right into the case. Where does this bruting claim that they claim is there exist? This constitutional right. Well, certainly it's not in Debra P. Debra P. involved two issues. One, as Judge Barbour noted was because of discriminatory effect that it was having on students who have gone segregated schools below. And secondly, because the diploma was the property right. It was

the cessation of education. It was the right to leave with something that has value in the market place. Somebody who leaves school without a diploma has a different market place value than somebody who leaves it with a diploma. This is a cessation of education case.

Certainly can't be found in the case law with on suspensions that's Goss, that removes a kid from the courtroom. As this court held in Navarras, (phonetic) taking a child who was disruptive and putting him in a different educational environmental doesn't trigger due process, well here we're taking a kid and leaving him in the same educational environment with remediation. Certainly, it cannot be found in Tinker, which is a 1st amendment case or on cases on race discrimination which you just heard counsel say he disclaims any intentional discrimination here.

There is really a question of a floating constitutional right that they want to create - - It is the Pandora's box of horrors because if indeed there is a right to promotion then every test that relates to promotion creates a due process issue because all of that goes toward the promotion decision. So, first grade coloring assignment that goes toward promotion ultimately as a due process and the second grade spelling test and fifth grade science assignment and sixth grade essay of how I did my summer vacation. Every test of which any portion goes toward a promotion decision would have a due process rule. That is not the law and that shouldn't be the law. In fact, five different courts have looked at this very issue and have rejected that claim. Three federal courts, the Fourth, the Eighth and the Eleventh have specifically held there is no constitutional right to promotion. The Fourth Circuit case is the Sandlin (phonetic) case that's cited in New Orleans brief, 643 Fed second 1027. The Eighth Circuit case is KILLIAN VERSUS BURROW,

it's cited in our brief. And the Eleventh Circuit case is Bester. In fact, Bester was decided three years after Debra P. They all cite Debra P. As Bester noted, this was Judge Godbul (phonetic) writing for the court. "Minimum reading standards for promotion do not violate due process because students have no legitimate expectation that failing to do satisfactory work will allow them to stay at a level that is academically unsatisfactory". And that's a case in which there was an objective test.

The two district court cases are ERIC VERSUS COSBY and Hartfield, (phonetic) both cited in our brief. In ERIC VERSUS COSBY not only did they find no constitutional right to promotion, but in that case the standards were put in place one year before the test. Here Louisiana statutes are RS-17, as I'll get to in a minute, promulgated more than ten years before this test talked about this issue. And although I don't believe any evidence is before this Court properly because this is a Motion to Dismiss. The only witness the plaintiffs put on testified that she knew as early as 1993 and 1994 what was going to be tested and what the standards were and that any teacher could look at those standards and see.

Now the statute the plaintiffs cite don't create a private cause of action. The Louisiana constitution says there's a right to education, it doesn't say there's a right to promotion. There's certainly no right under federal statutes that they've cited. I think they've been waived for failure to brief but in any event both are funding statutes. One was appealed in 1999, 20USC Section 5886 was repealed a year before the case was filed. This Court has held time and time again that there is no private right of action under appropriation measures and they don't by any stretch of the imagination meet the full court versus ASH test. The

Louisiana operative statute is 17:24.4. It passed in the early '70s amended in the '80s and as late as the '80s it said, in 1997 and '98 there's going to be a pilot plan in '98, '99. There's going to be test for the fourth and eighth grade and it says in that statute that's been on the books for many many years that if the students fail to achieve a level of proficiency then they among the remedies that are provided for is not to be advanced to the next grade. The plaintiffs cannot hold public school districts to an implementation of educational standards in a public school setting. When we talk about the cases, there is not a single ounce of support for the plaintiff's position. And more importantly five separate courts have specifically rejected those claims including three that had objective test.

I do want to mention briefly the jurisdictional issue. We briefed it, they did not appeal from the only order that's appealable, the October 10th order and although they parsed the words in their brief about what they thought they said, they didn't say it in the order. But even if this case is properly before the Court, no Court has ever imposed a constitutional criteria on a test given by schools and used in promotion decisions. No court has ever held that because there is a property right in a diploma, there is a property right in promotion. In fact, every court since Debra P. that has looked at that has rejected. As the court held in the Sandlin case, the Fourth Circuit, educational decisions on academic performance on stands of promotion are " Peculiarly within expertise of legislatures and are particularly inappropriate for review in a judicial context." This court should not do what no other Court has done. It should not create a right where none exist. It should not hold that every test that could be used for promotion triggers due process inquiry. The

decision below on the Motion for Dismiss is correct and should be affirmed.

Judge Davis:
Mr. Edom.

Mr. Edom:

Good morning, Your Honors. My name is Frank Endom for the Orleans Parish School Board, defendant. We join in Mr. Rubin's comments and would like to add just a few. First, to clarify a quote that was taken from the school board's brief from page 14 relative to the liberty of due process rights. The counsel did not complete the entoire sentence when he read, " The existence of this property right requires the observance of federal procedural due process minimum in some situations", "in some" situations. Citing GOSS VERSUS LOPEZ, page 14 of our brief. That leads us to the point that if the Court observes the relief sought here is for a moratorium of the retention policy established by BESE for a three or four year period. A moratorium. Therefore, the interest at stake here is whether persons can be protected -- There is protection for promotions under the due process laws and as Mr. Rubin has pointed out such protection does not exist. As the Supreme Court long ago in BOARD OF REASON VERSUS ROTH said, first we must look to see what interest is at stake before we decide whether or not due process applies. If it is not a constitutional protected right, due process does not apply. When you look at Debra P. case, you will see that the Court first found in an implied property right the expectation coming out attending classes and so forth are also found a valuable property right to their diploma. It is only after that the Court found a property right in graduation and a diploma

that they looked at the issue of fairness. Fairness then would be an exceptional procedure and if we don't have due process to begin with, due process protection then the question of fairness doesn't come from the Court and for those reasons we submit that the Court was correct in granting the school board the State's motion to Dismiss and the judgement should therefore affirm. Thank you.

Judge Davis:

Okay, thank you. Mr. Zanders, back to you.

Mr. Zanders:

May it please the court. I would like to go directly to the representation by counsel that five courts had ruled that students did not have a right dealing with education decisions.

Judge Davis:

That's not exactly what he said. He said there's no property right in promotion.

Mr. Zanders:

Yes. Thank you, Your Honor, for that correction. But I'd like to refer the Court to those four cases and let the Court know what those four cases was about. In KILLIAN VERSUS BURROW, the Eighth Circuit case, a first grader who had failed basic courses was mistakenly admitted into the second grade. He should not have been promoted and we agreed with that. But, the issue of a student failing regular courses, one first grader is not the same as a State imposed test where 20,000 students are

retained. So, that case is distinguished from the LEAP case and it involved an isolated incident of one student and one teacher.

Another case NAVARRAS VERSUS SAN MARCO, (phonetic) that's a Fifth Circuit case but in NAVARRAS a fifteen year old was suspended for throwing rocks at passing cars. He was suspended, placed in remedial programs. So, counsel would argue that's it's okay to put people in remedial programs. We agree in that instance where a student had disciplinary problems. That was the Fifth Circuit case. But we're talking about a State mandated retention for remediation prior to teaching which totally different from the NAVARRAS VERSUS SAN MARCO.

Another case, ERIC VERSUS COSBY,the District Court cited that case in the ruling. The Eric V. case is different from our case in that Eric V. students were given end of the year test as opposed to, and that's why Judge Jones I mentioned cumulative, It was an end of the year test. More importantly parents -- The State required that parents be notified about the need for remediation prior to the test. In Louisiana there was no such prior notification.

In the last case, the fourth case I'd like to mention is BESTER VERSUS TUSCALOOSA, an Eighth Circuit case. That case specifically mentions Debra P. as a controlling authority but in Bester it was a fight over social promotions. We're saying that if teachers say that students should not be promoted, then they should not be promoted. But, I would like the Court to look at our brief when Orleans Parish School Board passed a resolution saying that the students weren't ready. When the board president said that the State should not remove teachers from the evaluation process. Now, in terms of the notice that students were given. The letter on the easel is dated June 30, 1998. That

was the letter with the update for LEAP material, June 30th. In that letter there is no mention of retention. There were various options but no mention of retention as Plaintiff Exhibit A and then in the same letter there's language about remediation and specifically the State said that money will be set aside for remediation and those remediationprograms could be used as various intervention options. Retention was just one of many. There was no mention as of '98 about students being retained. And then how do we know that enough time wasn't given. The test results speak for themselves and in Orleans Parish only eighteen percent of the students were performing at the basic level. Fifty-two percent of the students eighth graders were retained.

Now, in any education circle in American if ten percent of the students are retained perhaps the students are at fault. Fifty percent, someone else is at fault. And we respectfully, suggest that in no way would we come before this honorable court and talk about every test that a teacher gives gives that student a right to go to Federal Court. Teachers have that right. But, we're saying the State has taken the right away from the teachers and have imposed a test whether it is difficult or not difficult, the test results show that it is difficult. The numbers this year reflect basically the same failure as before. So, we're asking the Court to look at the right of students given another important case BROWN VERSUS BOARD OF EDUCATION, Topeka, Kansas, which is mentioned again in Debra P. That court said -- The case said that today education is the most important state function. Education teaches citizenship. It teaches students to respect authority. And if the Court does not allow students to have some moratorium on this, we think it will do more harm against the State interest than good. Thank you.

Judge Davis:

Thank you, Mr. Zanders. We have your case gentleman. Thank you very much. Finish with the docket for the week. The Court will recess.

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(Whereupon, Court was adjourned at 11:50 a.m.)

REPORTER'S PAGE

I Dorothy N. Gros, Certified Court reporter in and for the State of Louisiana, the officer, as defined in Rule 28 of the Federal Rules of Civil Procedure and/or Article 1434 (B) of the Lousianan Code of Civil Procedure, before who this is sworn testimony was taken, do hereby state on record:

That due to the interaction in the spontaneous discourse of this proceeding, dahses (--) have been used to indicate pauses, changes in thopught, and/or talk overs; that same is the proper method for a Court Reporter's transcription of proceeding, and that the dashes (--) do not indicate that words or phrases have been left out of this transcript;

That any words and/or names which could not be verified through references material have been denoted with the phrase " (phonetic)".

/s/ Dorothy N. Gros
Dorothy N. Gros, CCR

CERTIFICATE

I, Dorothy N. Gros, Certified Court reporter, in and for the State of Louisiana, authroized by the laws of said State to administer oaths and to take the depositions of witnesses, hereby certify that the foregoing matter was taken before me at the time and place herein above stated; the matter being reported by me and thereafter transcribed under my supervision; that the foregoing pages contain true and correct transcription of the matter as thus given to the best of my ability and understanding.

I further caertify that I am not of counsel nor related to any of the parties to this cause, and that I am in no wise interested in the result of said cause.

/s/ Dorothy N. Gros
Dorothy N. Gros, CCR